UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

FAIR ISAAC CORPORATION, and myFICO CONSUMER SERVICES, INC.	)	CIVIL ACTION NO. 06-4112 (ADM/JSM)
vs.	)	
EXPERIAN INFORMATION SOLUTIONS, INC.; TransUnion, LLC; and VantageScore SOLUTIONS, LLC; and DOES I through X	)	Courtroom 13 West Wednesday, April 1, 2009 Minneapolis, Minnesota

H E A R I N G O N

TransUnion's MOTION TO BIFURCATE FOR A SEPARATE TRIAL ON PLAINTIFFS' BREACH OF CONTRACT CLAIM
[DOCKET NO. 572]

VantageScore's and TransUnion's MOTION FOR SUMMARY JUDGMENT DISMISSING CONTRACT-RELATED COUNTS (COUNTS 13 AND 14)
[DOCKET NO. 575]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING TRADEMARK-RELATED COUNTS (COUNTS 1-4, 6 AND 7)
[DOCKET NO. 579]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING ANTITRUST COUNTS (COUNTS 8-12)
[DOCKET NO. 585]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING FALSE ADVERTISING COUNTS (COUNTS 5-7)
[DOCKET NO. 594]

PLAINTIFFS' MOTION TO STRIKE EXHIBITS 49 AND 50 OF BRYAN GANT'S REPLY DECLARATION
[DOCKET NO. 659]

BEFORE THE HONORABLE ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE

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* * * * *

(9:00 a.m.)

P R O C E E D I N G S

IN OPEN COURT

THE COURT: Thank you. Good morning. Please be seated.

THE CLERK: The matter before the Court is Fair Isaac Corporation, et al. v. Experian Solutions, Inc., et al.

Counsel, would you please note your appearances for the record.

MR. SCHUTZ: Good morning, your Honor. Ron Schutz of the Robins, Kaplan, Miller & Ciresi law firm on behalf of the plaintiffs.

In the courtroom today also on behalf of the plaintiffs are Rick Rule and Joe Bial from the Cadwalader law firm in Washington, D.C.

At the second counsel table we've got Randy Tietjen, Mike Collyard, and Chris Larus.

Also in the courtroom today, your Honor, is the general counsel of Fair Isaac, Mark Scadina, right back there, and Renee Jackson, in-house counsel for Fair Isaac.

Thank you.

THE COURT: All right. Thank you.

Counsel?

MR. MILNE: Good morning, your Honor. Robert Milne with the White & Case law firm on behalf of Experian,

and with me today from White & Case are my colleagues Jack Pace, Chris Glancy, and Brian Gant at the second table.

And also with me today is Ann Sterling, in-house at Experian, in the back row.

Thank you.

THE COURT: Mr. Jacobson.

MR. JACOBSON: And, your Honor, Mark Jacobson from Lindquist & Vennum for Experian as well.

THE COURT: All right. Counsel?

MR. GARDNER: Good morning, your Honor. My name is Jim Gardner. I represent TransUnion. With me is my partner Dao Boyle and my trusty guide Lew Remele, and John Blenke, who is the general counsel of TransUnion who's here today.

THE COURT: All right. Does that conclude appearances?

Ms. Berens?

MS. BERENS: It just goes on and on, your Honor.

THE COURT: I know.

MS. BERENS: Barbara Berens and Justi Miller on behalf of defendant VantageScore Solutions, LLC.

THE COURT: Good morning. Does that conclude the appearances?

(No response)

THE COURT: Well, it was one of the most elaborate

April Fools' jokes I've ever seen for you all to come here and gather just to tell me you've resolved this case.

(Laughter)

THE COURT: But perhaps not.

All right. We'll proceed first, as I understand the parties have agreed, with arguments on the antitrust claims. That's counts 8, 9, 10, 11, and 12. I guess we've allotted 30 minutes of argument for each side on those cases.

MR. MILNE: Yes, that's correct, your Honor.

THE COURT: And then I intend to take a break for about ten minutes and then we'll move on to the trademark claims, 20 minutes per side, and finally with what I've called the contract claims at ten minutes per side.

MR. MILNE: Your Honor, Robert Milne again for Experian.

I will be handling the antitrust claims for the defendants, but before we start the argument there is a preliminary matter that we wish to at least raise with the Court, and that is the issue of these supplemental submissions that came in from the plaintiffs, one on Friday and the second one in the late afternoon on Monday. And it was unclear to us whether that material was -- your Honor was contemplating that it would be fair game for oral argument today, just to take the antitrust submission, which is the

one that came in, as I say, late afternoon as we were getting on planes to head out here. That submission, you know, and basically in the guise of providing corrections to the record, what the plaintiffs did was to submit 26 new exhibits, 20 of which don't even purport to be corrections to anything in their brief, and included among that material is two whole deposition transcripts without any citation, pinpoint citation, as well --

THE COURT: Well, let's not use up argument time on this. It's my intent to decide this case on the briefs that have been submitted. If it turns out that I have to refer and look to the declarations that are submitted after the fact, then I'll let you know and we'll figure out what we do about it, but I think we have an abundance of material and briefing on the main issues and there's been a lot going on before -- after the briefs have been submitted that I choose to just ignore, so let's get to the argument on the antitrust claims.

MR. MILNE: Okay. Thank you, your Honor. And actually, we wish to make use of your courtroom technology here --

THE COURT: Okay.

MR. MILNE: And I have some PowerPoint slides and I have hard copies of these which I can hand up.

THE COURT: All right.

(Documents handed to the Court)

MR. MILNE: And I'll just note for the record that I offered the plaintiffs a copy if they would be willing to exchange with us theirs and they declined.

THE COURT: Surprise, surprise.

MR. MILNE: Yes.

THE COURT: All right. Let's just move ahead today.

MR. MILNE: Okay. And also, your Honor, I'd like to reserve ten minutes of my 30 for rebuttal if that --

THE COURT: You may as long as it comes out of your 30.

MR. MILNE: Okay.

THE COURT: John, I'm going to ask you to keep an eye on the time.

MR. MILNE: Okay. Well, your Honor, to get to the argument here, at the outset, what I'd like to emphasize here and to ask the Court to keep in mind as you consider these antitrust claims, that what Fair Isaac is attempting to do here really is to subvert and pervert the antitrust laws on multiple levels.

Number one, what you have here is a long-time, well-entrenched monopolist that is claiming that a competitor that over a three-year period has managed only to gain a few points of market share nonetheless somehow stands a dangerous

probability of monopolizing that same market.

Number two, you have a plaintiff that is coming in here and claiming injury based on the fact that it had to lower its prices to respond to low-price offers from the competitor defendant, and the plaintiff is asking you to put a stop to that low-price competition.

And number three, you have a plaintiff that is coming in here and claiming to be a champion for consumers, for customers, when at the same time that plaintiff is asking you to dissolve the only new competitor that has offered choice to customers that's come along in years and in a situation where customers are delighted to have that choice.

I put up on the slide here just some of what we obtained in third-party discovery here from customers and from Fair Isaac, and it's crystal clear from that discovery that customers are happy that VantageScore has been there to offer choice and to give them the ability to leverage lower prices. Fair Isaac itself received feedback like that from customers. So it's important to keep these issues in mind as we think about the antitrust claims here.

Now, time isn't going to permit me to cover the detail of what's in the extensive briefs, but today what I'd like to do is first of all answer any questions that your Honor may have, but in addition to focus on three major themes or issues that we think really compel summary judgment

here.

The first is the absolute lack of standing, the failure to establish antitrust injury; number two, the failure of proof on the merits; and number three is the sort of really remarkable existence of evidence that actually affirmatively contradicts the plaintiffs' claims of wrongdoing here.

So I'll start with standing. And as we've said from the beginning of this case, your Honor, there is something perverse about a long-time monopolist coming in and suing a start-up company and accusing it of monopolization. It would be as though Microsoft turned around and sued a small start-up operating system developer and accusing it of monopolizing the market.

THE COURT: But isn't there also something pretty unusual about cooperation among the three bureaus and the relationship in the field? I mean, there aren't that many players in this field.

MR. MILNE: Well, your Honor, a couple things there. Nothing unusual at all about cooperative joint ventures. Those are ubiquitous in the industry. There's nothing inherently problematic about companies coming together, especially when they are coming together to form a new competitor. I mean, it's undisputed here that for years the only effective three-bureau competitor in this space was

Fair Isaac. The only entities really capable of coming in and offering effective competition were the three bureaus.

The thing that Plaintiffs have raised in the past is this whole idea that if you add up the market shares of the three bureaus in respective data, that they control all of the data, and when we were before you earlier on the motion, the 12(c) motion, they were at that time claiming a conspiracy with respect to data. They were claiming a boycott. They were saying that the bureaus had conspired with one other to deny access to data. Now that claim has gone away. There's no possible basis for such a claim. The facts as we set forth in the brief make clear that, number one, Equifax has entered into this preferred partnership arrangement with Fair Isaac where they are now working together arm in arm to develop new scores and to distribute existing scores and to give long-term access to data, and the two -- the other two, Experian and TransUnion, continue to distribute the Fair Isaac scores to lenders. They continue to work with Fair Isaac to improve their existing scores. So the idea that there's something about the fact that the bureaus control an input, there's no basis to that, and so there's nothing about that that makes this case somehow different.

Now, as I say here, you know, the plaintiffs are in here and again a long-time monopolist is suing a start-up

company. Antitrust is very suspicious of lawsuits -- antitrust suits by competitors against one another and there's a good reason for that, and that's because competitors have an incentive to use the antitrust laws to thwart competition and not to protect competition. And that suspicion is embodied in the antitrust injury doctrine which we submit applies with a vengeance in this case, and it applies both with respect to damages and with respect to injunctive relief. And let me first talk about damages.

Now, let's go to the first slide there, Bryan.

The Supreme Court has made clear in the **Atlantic Richfield** case and other cases that a competitor plaintiff cannot sue based on the consequences of nonpredatory low-price competition. There's no claim of predatory pricing in this case, your Honor. That's crystal clear from the Supreme Court's teachings. Fair Isaac's damage model here is based in large part on that basic theory. Their expert, their damages expert, calculates damages on the basis that Fair Isaac had to lower its prices to its customers in response to low-price offers from VantageScore. And the right-hand side of this slide, your Honor, has some quotes from their expert's report, and it's clear that that's what he's doing. So in other words, the theory of damages here is that if it hadn't been for VantageScore, Fair Isaac would have been able to charge more to its customers and therefore

they're entitled to recover that additional profit as damages. That stands antitrust injury on its head and it's flatly barred by the Supreme Court case law.

In addition to that, the entirety of Fair Isaac's damage model is predicated -- and let's go to the next slide here. This is another quote from their damages expert -- is predicated entirely on the assumption that VantageScore would never have been introduced. In other words, they are basing damages on the idea that had there -- but for VantageScore, they would have made more money. They are seeking damages on the basis of increased concentration and lessened competition. That is forbidden under the **Brunswick** case, under the **Cargill** case and others that we've cited in our papers. It's just flatly forbidden. So the bottom line is that Fair Isaac's damage theory fails and summary judgment is appropriate as to that, which cuts across all of their antitrust claims.

The same goes for Fair Isaac's claim for injunctive relief to the extent -- and remember, they're seeking dissolution here, dissolution of VantageScore. It cannot claim injunctive relief on the fear that in the future it may lose sales or lose profits because of the continued presence in the marketplace of VantageScore. That same kind of reasoning is what's barred in cases like **Cargill** and **Brunswick** and the like. But in addition to that, the case

law requires -- and this isn't disputed -- that Fair Isaac has to show -- to qualify for injunctive relief, Fair Isaac has to show a real and immediate threat of harm, competitive harm, antitrust injury, and Fair Isaac can't come close to doing that here.

Number one, VantageScore has been on the market for three years now and it has not even come close to denting Fair Isaac's monopoly position, so where is the immediate threat? What has changed that would say that Fair Isaac faces a threat in anything like the near term of -- or at any point from being driven from the marketplace? As I mentioned before, Fair Isaac continues to have access to data and distribution three years down the road. Fair Isaac has entered into this preferred partnership arrangement with Equifax which makes it a preferred -- they're working arm in arm on a long-term basis. And Fair Isaac's chief executive -- and we cited these quotes in our brief, the opening brief at page 11 -- told the public that this arrangement is going -- will secure our long-term future.

And Fair Isaac's economist, their expert Professor Noll, said that because of this preferred partnership, that the very fact that Equifax is now committed to cooperate with Fair Isaac going forward will necessarily undermine the long-term prospects for VantageScore. And since VantageScore is the supposed agent of Fair Isaac's harm, the idea that

VantageScore is impaired going forward again undercuts any kind of argument that Fair Isaac faces a real or immediate threat of harm.

And then finally you have -- and let's go to the quote here. As recently as a couple of weeks ago, Fair Isaac's chief executive is telling investors publicly that he continues to be optimistic about the company's future, no suggestion of a threat of being driven out of the marketplace or impairment to his business as a result of competition from VantageScore or the activities of the credit bureaus. Now, Fair Isaac can't tell investors one thing and this Court another thing.

So, basically for those reasons and others in the brief, their claim for injunctive relief fails as well, and without a valid claim for damages, without a valid claim for injunctive relief, they simply have no standing. That cuts across all of the antitrust claims.

So, briefly, Judge, I want to turn to my second two themes -- the second of my three themes, which is the failure of proof. We get into the detail in the briefs. I'd like to just focus to give you a flavor, your Honor, on their claim -- as you know, they claim that there is a conspiracy between the credit bureaus to impose a price floor, to increase artificially the price of VantageScore to a level -- not lower than the price a bureau was charging for the FICO

score.

Under controlling summary judgment case law, including the **Matsushita** case, including the **Blomkest** case from the Eighth Circuit that we cite in the briefs, Fair Isaac has the burden on summary judgment of presenting evidence that tends to exclude even the possibility of independent conduct. They can't come close to doing that here.

Most importantly, when you look at the evidence that they submit, they have none that shows that the bureaus communicated -- sure they were communicating with each other. They had a joint venture. But after extensive discovery, they have not been able to come forward with any evidence showing that the bureaus actually communicated on the subjects of the supposed conspiracy: price floors, some of the other conspiracy claims that they make and that are detailed in the briefs. When you look at the evidence, you'll see that their claims, the things they sort of articulate as fact, are not borne out by the evidence that they cite.

So on the one hand what Fair Isaac tries to do is they try to sinisterize perfectly routine joint venture communications, and again, when you look at that evidence I think you'll see that. But then on the other hand what they do is they take purely internal credit bureau documents,

internal deliberations of a particular bureau on things like prices, things like market conditions or expectations about what the market may do with no suggestion, no linkage that any such internal deliberations were communicated among the bureaus. The essence of this claim is agreement and they have not come close to establishing agreement here.

And just to give a flavor for the ways in which they take liberties with the evidence, I want to focus on two things.

On the slide here is an excerpt from their opposition brief and they're discussing the minutes of an early joint venture meeting in 2005, and they say: "When [those] are read together with a written business plan that was distributed at the meeting, they show ... that the bureaus discussed ... pricing." And the clear tenor of all of this was that this was supposed to have been a conspiratorial price discussion about the price floor, what they're claiming here. They didn't submit the actual business plan to the Court. They submitted the minutes. The minutes don't talk about pricing, but they didn't submit the written business plan. That business plan we attached and you can see what it says about pricing. Yes, the word "pricing" appears, but it says that retail pricing will be established by the individual credit bureaus. CRA stands for Credit Reporting Agency. So it says the opposite of what

they would in effect have the Court believe it says.

Okay. The second one I want to focus on -- these are really their two big pieces of evidence on the existence of some kind of price floor conspiracy and these are these handwritten notes from the consultant, Mercer, Oliver & Wyman, and they say in their brief that it reveals a discussion about pricing, again creating the impression that it was a discussion about a price floor conspiracy.

What the notes show is that the subject of the discussion was a Washington, D.C. presentation that was made to regulators shortly after the launch of VantageScore. And you can see from the notes here that when you work down, they're talking about the subject of the presentation and then underneath it is -- subheading one is the structure of the presentation, and then underneath that is "key messages" for the presentation, "Each bureau [will have a] good feel," and then it goes through some of the aspects of VantageScore: stability, the fact that it provides choice in competition, pricing is referenced there, dissatisfaction with current provider and transparency.

Now, Fair Isaac would have the Court draw an inference that the discussion here of the key messages for a public presentation was this nefarious price floor conspiracy. That is not a reasonable inference to be drawn from this document, and again, they have to exclude the

possibility of independent explanations, have to exclude the possibility, for example, that that reference to pricing was not a reference to the fact that the bureaus were going to price independently or was a reference to the fact that VantageScore provides lenders with a more refined ability to price loan products.

And actually, one of the attendees at that meeting, Mr. Oliai, can't recall specifically what that reference was, but in his declaration indicated that's what he believes it is. Again, the evidence that Fair Isaac has to submit here must tend to exclude the possibility of independent conduct. This evidence does not do that, your Honor.

And I just also want to make a brief note -- it's covered in more detail in the briefs -- on the alleged unilateral acts. They allege the conspiracies which we detail in the briefs, but then they allege certain unilateral acts that they say are anticompetitive, alleged price hikes on FICO after VantageScore was launched -- how that coincides with the conspiracy to price VantageScore no lower than FICO I don't exactly know -- and the curtailing of access to data.

These claims, first of all, have no factual support on the access to data. As we said, the access continues. There's a preferred partnership, the other bureaus continue to work with Fair Isaac. And again, since they are not claiming conspiracy here with respect to data and no bureau

is a monopolist over its own data, as the Supreme Court clearly held in the **linkLine** case that came down just a few weeks ago, a monopolist has no duty to deal with anyone, let alone on terms that are congenial to a plaintiff. And so there's -- you know, there's no basis for antitrust liability based on unilateral conduct like that.

I know I'm running up against my 20 minutes here. Just briefly to the last theme, which is sort of the evidence that contradicts the claimed wrongdoing. We have next to nothing, really nothing with respect to the claims -- suggesting agreement, and as against that you have affirmative evidence to the contrary, whereas Fair Isaac claims a conspiracy to price VantageScore high in comparison to FICO. Their own expert, their own expert found that there was wide low pricing on VantageScore offered by the bureaus. Whereas Fair Isaac claims a conspiracy among the bureaus to offer preliminary discounts to only 12 large financial institutions, their own expert found over 300 financial institutions that were the beneficiaries of low price -- low-price VantageScore from the credit bureaus.

Quickly with respect to the documents. They claim that there is a conspiracy among the credit bureaus to abandon the in-house bureau scores. Again, that hasn't happened in three years, but there's no communication among the bureaus on that subject, no evidence of that. The only

evidence that we were able to find in the record to reflect a discussion among the bureaus about what to do with their internal scores reflects the opposite, and that's this document that we attached as Exhibit 30-F to the Gant declaration, and this is notes from the bureau, a joint venture meeting, and it says the intent is to add to, not replace, what's available at the individual credit bureaus. That's what the truth is here.

And then finally what you have here is the sworn statements of the credit bureau executives that were submitted in connection with this motion. They have come before this Court and under oath said: We didn't do these things. And given the absence of evidence here that any wrongdoing occurred, those declarations are entitled to great weight here. Now, Fair Isaac just wants to brush those under oath statements aside and say, well, they must -- of course they're lying, of course they're committing perjury, but they can't do that on summary judgment.

So, your Honor, whichever way you cut this, whether it's a lack of standing, which itself is sufficient to grant summary judgment, failure of proof, the existence of contrary evidence, their claims fail here and summary judgment is appropriate across all of the counts.

The last slide here is just kind of a bird's-eye view of the specific counts and the various ways in which

summary judgment is appropriate as to each.

Thank you.

THE COURT: All right. Thank you.

MR. RULE: Your Honor, I guess -- let me just give a couple of hard copies of my presentation to Mr. Milne. My only objection was giving it to him before I started and I have no problem giving it to him and to you, obviously, now.

Your Honor, good morning. It's an honor to be here. Let me start -- and I'm just only going to touch very briefly on the motion to strike and I hear your Honor very loudly and clearly.

As we indicated, I think that the gist of what one should take from what they have filed is that in fact there are disputed issues of material fact and that that's something appropriate for the jury to resolve as Judge Kyle stated in the opinion that we gave you. I will say, however, on behalf of myself and my colleagues, if your Honor would like, we would love the opportunity to respond to their Exhibits 49 and 50 --

THE COURT: No, I've got plenty of material to decide this case. These declarations that go on and make charts and graphs of it, to me, it is just a back-door way of extending the word "limit" and getting more briefing in and I'm going to do my best to ignore them and that's kind of where we stand.

MR. RULE: Okay. Well, your Honor, there are a few things there I probably am going to call your attention to, because they actually, I think, are relevant and help us.

But at the outset, your Honor, I'm going to speak to the antitrust claims and I want to just say at the outset that a great deal of what the defendants did in their opening brief and what Mr. Milne did here this morning is focus on Fair Isaac and its position in the marketplace, and I just want to start off by saying that, and frankly, the bulk of what they put in the record is really irrelevant as we pointed out in the **Kiefer-Stewart** case and everything else. Regardless of what our position is, that does not excuse an antitrust violation or conduct that amounts to a boycott on steroids against us.

It's interesting that Mr. Milne would mention another of my clients, Microsoft, which I am acutely aware of what happened with them. But if you go back and look at the case that was against Microsoft, it was basically Microsoft going in and engaging in what the court found to be illegal behavior to displace Netscape, which at the time of its conduct had like a 90 percent market share in the browser market. So the fact that somehow the law lets the defendants do whatever they want just because we're big is entirely wrong. However, I think it gives you a little bit of a window into their soul, your Honor.

I think that they really did believe -- they were certainly frustrated that Fair Isaac was in the marketplace and earning the profits it had and I think there was a sense of entitlement and right to basically do whatever it took to displace Fair Isaac, and I think that's important to keep in mind.

THE COURT: But at some point I do have to look to the dangerous probability of success and I think that's where market share all comes into play.

MR. RULE: Well, I think, your Honor, one thing that I would say on that is I would invite your Honor to look at **General Dynamics**, the **U.S. v. General Dynamics** case, the **U.S. vs. Continental Can** case -- and we can discuss this more -- essentially where the court warns -- this is the Supreme Court -- warns that evidence during the pendency of litigation is often misleading, because parties often withhold their most egregious acts until after the litigation is over.

I think it's kind of astounding -- we certainly have not abandoned our claim about their control over data, their control over pricing, and I think the fact that their frustration has bubbled up an Experian decision to stop selling FICO scores hung on Experian data to consumers. I think that's pretty clearly a shot across the bow, an indication of what they can do when this Court is not

watching.

But let me start, your Honor, with the fact that when we began --

THE COURT: I'm not sure I understood that. Would you say that again? You lost me someplace.

MR. RULE: What I said was that if you -- they basically in the last year cancelled the right to sell Experian FICO scores to consumers that is hung on their data. They point out that they did extend the agreement with business lenders, but they prevented consumers from basically getting FICO scores with Experian data.

Now, the fact that they could do that I think is an indication of the power that they have over the control of the data that's absolutely essential to get a score to the marketplace and the fact that they have control over the distribution channel. While they may have refrained from doing anything particularly egregious during the course of this litigation, I think that's, as I say, a warning shot across our bow that once this is over, they're going to be in a position to essentially use that power to displace us from the marketplace. But if I can go through, I'll show you some of the evidence, your Honor.

When we started off we were focused on a rule-of-reason case. We did that because we felt that when you get three -- the only three bureaus together that have a

hundred percent market share in a concentrated industry and an oligopoly, that it threatened us, threatened to exclude us and threatened to harm consumers in data markets. That was the case. That was what your Honor looked at in the first hearing here.

THE COURT: But that's changed as the case has gone on.

MR. RULE: Absolutely. And the reason is, your Honor, at the time, as it's now become clear -- it hasn't been easy to do this and I'll show you -- there was a smoke screen of disclaimers, basically destruction of documents and even frankly outright dissembling, to basically hide the true nature of this. And what we found as a result of looking at this is that there was a conspiracy very -- in a very targeted way to go after Fair Isaac, to displace Fair Isaac, and to do it in a way that they could take intact the profits that Fair Isaac was earning and appropriate them to themselves, much more invidious, much more pernicious, and they could do that because their power over data and distribution allowed them to do that.

But basically what they've agreed to do is not to compete amongst themselves and they basically sat around and targeted the most important customers for Fair Isaac and basically said we'll go after them with temporary discounts, if necessary, and there are certainly some of those.

Second, they got together at the same time and said: Look, you know, we're like the three musketeers, one for all, all for one, so let's make sure we're not selling our own tri-bureau scores that they were developing.

THE COURT: One of the musketeers has defected, apparently.

MR. RULE: Well, your Honor, normally you would think when a musketeer defects that's pretty much an admission that they are a musketeer, and frankly, I find it somewhat interesting that a settlement is being used as evidence that there wasn't an agreement. Moreover, I find it interesting that they're particularly up in arms about a settlement that essentially guarantees Fair Isaac fair treatment. That's what -- when you get right down to what the agreement says, it allows us to have a relationship with them and -- so again, fair treatment in a settlement doesn't seem to me to disprove the existence of a conspiracy, and at any rate, the conspiracy existed before whatever settlement there was. But at any rate -- so the second thing was to get rid of their tri-bureau scores.

And the third -- and this is the real key, your Honor -- was essentially to agree not to compete among themselves. They understood -- and I'll explain why this is clearly rational. If left to their own devices, each of them would engage in loss leading with this product, the

VantageScore. They had it at a zero marginal cost, there are absolutely no capacity constraints, and it's the identical product. Remember, they've gone out to the market and they've said VantageScore is the same whether you buy it from Experian, TU, or Equifax. So common sense tells you that in that kind of situation, competitors left to their own devices will compete against each other, loss lead to try to get more market share in their underlying data products. They understood that that was a problem and so what they agreed to was this notion of value proposition pricing, so they agreed to valued proposition pricing.

And the interesting thing is, your Honor, whereas they told you before that what this was all about were low prices, in fact now -- and again, this is something I would call your attention to -- in their declarations, they've submitted two declarations that essentially admit that three years after they are engaged in value proposition pricing.

First, Mr. Callaci from TU, basically in responding to his statement on deposition record that: "'We don't compete on price' with Fair Isaac," explains that what he meant was: "[B]ecause we (TransUnion) have attempted to price VantageScore as a premium score rather than discounting the score relative to the Fair Isaac scores we sell."

And then they submitted a declaration from Experian, Mr. Reeves. Mr. Reeves tells you that he too --

that is, Experian -- "[W]e believe that VantageScore brings more value to customers than the market-leading FICO score based on its greater predictive power and other benefits and that therefore a fair pricing approach for VantageScore would be to price it around the price of FICO scores."

So they've admitted that they're engaged even today in this value proposition pricing.

THE COURT: But there's no loss leading that actually happens, though, because the floor is set, correct?

MR. RULE: Correct. And let me just show you one thing. This is a pretty astounding document from Mr. Oliai. He basically says -- this is, you know, several months after the score had been launched in response to a question about giving a price break in response to a request from a large lender. He says: "I advise you against discounting VantageScore relative to FICO. We should promote the value," your Honor. He says: "We should promote the value of the new score and help them build" -- them. Who knows? I assume the bureaus -- "a business case in which cost savings to the bureaus is not a factor."

Now, that's very interesting. He's saying we've got to sell on value. We can't sell on cost. Well, I'll tell you what, your Honor. There's a very important case that I think you -- I'm sure you've read but you ought to focus on, and that's Judge Posner's decision in the **High**

Fructose Corn Syrup case. What he says there is: "In a competitive market, price is based on cost rather than on value." He was confronted with the similar kinds of arguments that these folks are saying, that, well, gee, pricing on value is really independent behavior, and he rejected that because he noted that in a competitive market, price is based on cost. We have both of our experts agreeing with that concept, both Murphy and Noll, and I would say that given what the defendants had said prior to these declarations, they also at least had to recognize the logic of that position.

But just to give your Honor a sense that this strategy was accepted, here's another statement from Randy Baker, the manager of strategic pricing at Experian: "I appreciate your pricing strategy" he tells one of his lower-level people, "However, it is a business decision to price FICO Classic and VantageScore at the same price point."

So then just to show how irrational this is if everybody's acting unilaterally, the lower-level person says: "So we'd rather pay FICO royalties than get a hundred percent of the revenue that we could get from VantageScore?" That doesn't make sense to me." What doesn't make sense to me doesn't make sense to economists, because that's not what you would see if people were truly acting independently.

And then we go, your Honor, to a truly amazing

document that Equifax produced at about the time of the launch, and this is an internal sales document. This is what they're telling their internal salespeople, your Honor: "Target and execute on sales cycles with these customers with a 'swap out' objective, not using VantageScore to take core market share away from" the other two musketeers, "Experian or TU."

Then we go on to another document, another Equifax document. This is right before launch where they're talking about potential market scenarios, and you'll notice that Smooth Sailing involves no loss-leading pricing, but apparently loss-leading pricing in this document is irrational behavior. Again, it's only irrational if there's an agreement.

You'll also note that Armageddon, the worst case scenario, would be that the CRAs would basically get confused on the strategy. Well, why is one CRA basically saying we should have, you know, solidarity and there shouldn't be confusion on strategy just because there's an agreement?

Now we flip ahead to September and we see the same sort of analysis from Equifax saying that it's Smooth Sailing, that the best case scenario is playing out. That means no loss leading. Clearly they're looking at the marketplace. This is an internal document, your Honor, but this is an internal document that's very probative, because

it's an observer in the market looking at what his competitors are doing.

Your Honor, I want to take you through the events here. You see the yellow line is sort of a discussion, a lead-up. I'm not going to really take you through much of the evidence there, but it's very clear that throughout that period there was a sense of, again, frustration that Fair Isaac was doing so well, very little in terms of, gee, we need a new score for the market, a lot about our profits.

You'll also see at the --

THE COURT: Remind me when the complaint was filed here, early '06?

MR. RULE: No, no, your Honor. It was filed in October of '06.

But if you begin, you see that there were some -- what we have listed at the top here are the scheduled meetings and scheduled conference calls. There were relatively few scheduled ones. There was a meeting in early 2004 where the idea of a tri-bureau score jointly created was discussed, but it finally sort of reached a climax towards the end of 2004, beginning of 2005, where the bureaus got together and decided, yes, we're going to get into a venture, and, yes, we're going to figure out a way to get these profits from Fair Isaac.

And what did they do? One of the first things they

did was go out and hire this independent consultant, Mercer Oliver Wyman. They basically told them what they wanted to do and Mercer Oliver Wyman's individual, Peter Carroll, put together this memo. It's called the Operation Triad, your Honor, and this basically is the blueprint. This is what he was told they wanted to achieve. This is what he was suggesting be done.

So first he says: "The bureaus wish to reduce the rent derived from this business relationship by Fair Isaac, believing that the current arrangement over-rewards Fair Isaac for what they bring to the table."

Next he says: "Opportunity. We are told that Fair Isaac has a $160 million business related to these scores. In principle, the bureaus could build their own scorecard(s) and transfer this revenue entirely to themselves -- and do so at relatively low incremental expense."

Well, they continued to cite that $160 million -- basically 167, which was Fair Isaac's profits -- even at the time of launch.

Then he goes on to say: "Risks to the bureaus." If one bureau tries to do this, it won't work because basically the lenders will switch to the other bureaus.

And then he says: "The banks are likely to want a period of dual-score availability, if not indeed a permanent

choice" of Fair Isaac. "If the three bureaus act in concert, as 'Triad,'" he calls them -- it subsequently became Trident -- "this particular risk is minimized."

And then he goes on to say: "If customers believe the FICO scores to be superior" -- and of course, again, we think the evidence shows that the VantageScore is not superior, even though they presented it that way. But even if customers believe that our score is superior, "they would be very upset with the bureaus but [they'd] Have little power to force the bureaus to deal [fairly] With Fair Isaac."

And then finally, your Honor, he notes, undoubtedly based on his conversations: "Fair Isaac could be expected to explore legal avenues to defend their rents, perhaps including claims of monopoly power on the part of the Triad."

So even in early March, your Honor, they understood that they were playing with fire and that they were running the risk of antitrust litigation. And what did they do? They basically gave directions to Mercer Oliver Wyman and everybody else to shred all documents. And while there's some dispute about what was shredded -- and fortunately I think for this Court and us a lot did survive and we can prove our case, but the fact is that a lot of documents were destroyed, a lot of things you would normally expect to see are not there. Basically for the most part what has survived are pristine, sort of cleaned up documents, but the raw

material, the raw notes, there are some exceptions, but they're largely missing.

THE COURT: Are there any raw notes of meetings that are missing, of meetings that occurred subsequent to the filing of the lawsuit? It's my understanding what you're claiming is missing is all from the early stages, is that right?

MR. RULE: It's missing from the early stages, but quite frankly, we don't have -- the meetings still go on and they continue to this day as we showed on the timeline, so they had plenty of opportunity for monitoring. We don't have those because of the discovery cutoff, but at any rate, very few of those documents survive.

Very early on after that Triad memo they're already talking about price. Piyush Tantia, who was the person in charge day to day for Mercer Oliver Wyman, in writing to Peter Carroll says this should be the same price for this tri-bureau score as a single-bureau FICO score.

Now, I want to say, your Honor, Mr. Milne got up here and said there's no evidence of pricing and he pointed to the document from TU from February of 2005. And what he didn't tell you and what they don't tell you and what you're going to have a hard time seeing in their call-out is the block that they quoted. It says: "Retail pricing will be established by the individual CRAs." But then the next

sentence is very interesting: "Wholesale pricing will be agreed upon by the board of NewCo and will take the form of a royalty on each score delivered to customers."

What that reflects, your Honor, and what they've actually admitted if you go to Exhibit 50 and the bottom of page 4 is that, yes, there were discussions on pricing. They have to admit that because there are some notes from Mr. Tantia, handwritten notes, some that survived, which are at Exhibit 217 -- it's MOW-FICO 00069102 -- where basically Equifax's lawyer, antitrust lawyer, says, you know, if you're going to have a wholesale price or royalty, it's got to be very low. They were continuing to discuss this sort of wholesale price arrangement all the way through, and if you look at the bottom of that exhibit, they admit that they did talk about that price. I mean, there's no question, your Honor, that they talked about price, it may have been a wholesale price, and ultimately we believe they abandoned that because the lawyers told them it was too easy a target and they ultimately settled on value proposition pricing, but no question they talked about price. But this concept of having sort of agreed to price floor value proposition began as early as Piyush Tantia's mail here.

Now, this is a very interesting document, interesting because MOW basically put together a sort of plan. Part of it was how to develop the score, but they also

went further and put in a business plan, and part of that business plan says that it would focus on pricing of the tri-bureau score, including introductory demonstration prices to encourage adoption, essentially what has ultimately been done here.

Now interestingly, Experian says: No, let's delete that right now. Right now is not the time to talk about that marketing plan, that business plan, but it may be appropriate for the next step to include value proposition. So keep that in mind, your Honor. As early as March they're talking about value proposition and as a concept, as an alternative, as a buzz word, if you will, for pricing.

Then we go forward, your Honor -- meetings all along here -- to June, and right about -- one of the days of the meetings we have this document that Equifax produced. And again, you'll notice in this document that there's this wholesale price on the left, on the right there's a concept of a retail price, and you'll notice that the price for all the bureaus is the same. And then under that they call out, they say: "Retail pricing 'floor' will be explored. LLC governance over testing, trial uses and loss leader pricing." Now, it's true it's an internal document, your Honor, but it's inconceivable that Equifax was not putting this together to basically reflect what they thought was going to be discussed at these meetings.

Then you go to August and this is a very important document. Their basic response to this document -- it's an internal document by a low-level official. Well, let's look who did it.

It's Dana Wiklund, basically the number two guy, senior vice president for analytics, writing to his boss, the chief marketing officer at Equifax, and this is the day before the following day on 8-23 when there's going to be a meeting, and he's basically showing him what the state of play is, what the risks are that are confronting these folks and how they're going to deal with it.

And first -- and I'll come back to this -- he talks about the need to obsolete existing tri-bureau scores and focuses specifically on the tri-bureau score of Experian.

Next he says: "A CRA" -- this is the risk -- "a CRA undercuts pricing on the final model and loss leads with it," points out that that's damage to future valuation for all three companies working on the project. How are you going to deal with that? "Gain agreement that price loss leading will not happen with this project deliverable."

And then we see down here a recognition of a risk that FICO files a lawsuit, "could be a legal issue that could stop the thing in its tracks." How are we going to deal with that? Are we going to go to the lawyers and ask them: "Gee, can we do all these things I just mentioned?" No, we're

going to go to the lawyers and "work with legal [] to make sure that we have covered the bases from an antitrust perspective." That sounds a little cynical to me, your Honor.

Then we go to October 7th. This is important, your Honor, because on October 18th there's a go/no-go meeting. So they're putting together the agenda for this meeting and the first agenda comes out. Kerry Williams, high-level individual at Experian, basically says: "[J]ust so we are clear ... this [agenda] does not cover the market strategy [] we will be presenting." Experian was going to present market strategy work -- and we'll talk about that in a minute -- and he gets an answer back: "That is correct. I have advised Mercer Oliver Wyman to put that agenda together as well" and it's going to deal with this marketing. And look what's there on number 4, your Honor: "Communications Plan - Initial and ongoing messaging to the market (value proposition)." So, remember they said in March: Let's take it off for now, but we'll come back to it in value proposition. Here it is. It shows up on the agenda for this meeting.

Then on October 14th we have -- there are two documents that -- I'm only going to show you the external documents. There are two versions of this document that look like what's going to be presented at the meeting on

October 18th. There's an internal version. Here's the external version, your Honor, and let's just see what they say. "Expected Competition Reaction." Do they have the CRAs? Do they have other people on there? No, it's FICO. FICO is the competition. And then what do they say? Matt's going to talk about pricing, okay?

Then we go to October 18th, the go/no-go meeting, and the sanitized, officially blessed deck has in the communications consideration: "To the market. Establish a clear and consistent value proposition." That's there. Now, we don't know what was discussed. That was what was on the deck. We don't know what was discussed. There are minutes of this meeting, very short, typically, of these folks, but the place where this would have been discussed? Guess what? It's redacted, your Honor. So we don't know what they actually discussed because they've chosen to redact that portion of the minutes.

Now, your Honor, we go to the Piyush Tantia notes that Mr. Milne referred to. If you go to the bottom, here's what it says. Now, I will tell you that their *post hoc* explanation of this is just completely faulty. I'm going to let you look at the two documents that are relevant here, but it's clear that the materials they were putting together for the Government were clearly different from this. But here's what he writes:

"Key messages. Each CRA has a good feel for the messages." "Pricing" is there. And I also call your attention to "Dissatisfaction with current provider." No "s" on that.

Then it gets written up subsequently, again as a separate bullet, separate from the discussion of putting together the materials for the regulators, and now "Each CRA has a good feel for the messages" is gone, and "ultimately" -- now it says: "ultimately to be decided by each CRA." Those are completely opposite concepts. "Pricing" is missing and "providers" now has an "s." So I think that that shows that pricing probably -- almost certainly was discussed, that Fair Isaac was discussed, but then afterwards in the official documents that were to survive the shredding, basically it was sanitized.

THE COURT: Okay. You only have a couple minutes left --

MR. RULE: Okay.

THE COURT: -- and I want to make sure that I get a chance to have you explain to me your damages.

MR. RULE: Okay. Well, let me just -- here's another internal document referring to value proposition with overall value.

I'm also going to show you -- there are three documents in the deck that show the sort of commitment to

value proposition pricing as late as 2007 around the time of one of these meetings. Here's one on the 17th, here's one on the 19th, and then here's one on February 1st, all of them from each of the different bureaus.

Then I want to also show you, your Honor, there's a statement here about discounts and basically we've heard a lot about discounts, but all it says is put in place discounts that sort of match FICO and Experian.

So -- and in fact there is some evidence -- now, frankly, Meyer did not look at those 300 entries. he excluded them. There's a lot of problems with the data.

But the fact of discounting, if you look at Judge Posner's decision, is, frankly, he takes it as evidence of a conspiracy because you don't see that kind of price discrimination in a competitive market. Moreover, all it really shows is that there was a differential between the Fair Isaac price and the price charged for VantageScore and in some cases in some of the things that they've submitted suggest that maybe the Fair Isaac price was increased.

Your Honor, I'm going to try to go through this pretty quickly. This is also the deck where --

THE COURT: Is this your damage theory? You're really about at the end of your time, so I want a few minutes of your damage theory.

MR. RULE: Okay.

THE COURT: You're going to have to rely upon what's in here --

MR. RULE: And you can look at that and you will see the evidence of talking about marketing and talking about obsolescence of scores. The one thing, your Honor -- let me just say this:

In terms of the damages theory, the fact is that to the extent that they have engaged in illegal activity to essentially put us out of the market and that has adversely affected -- we basically lost profits. The normal measure of damages in a boycott case or a monopolization case are lost profits. I mean, that's just the way -- that's what usually it is, and what this case is really about is a boycott case and we point out some of those cases.

And I should also say we're not asking to dissolve VantageScore. Perhaps that would be an appropriate remedy, but what we've said is, look, just divest it. Send it off on its own. Have it owned by a third party. The harm here is the fact that they own it and so that's the problem.

Your Honor, I want to show you one other slide. I just can't -- I have to show you this because I think it really proves one of the issues here that's very disconcerting, and that is this slide show that they presented to DOJ. And they basically touted Mercer Oliver Wyman as managing the process, and again, the evidence shows

that they in fact didn't. They were kept in the dark much of the time. It also said no, it will not lead to price coordination. We've shown that it has. CRAs retain the right to market their own scores. Again, they had an agreement on obsolescence.

But then -- this is particularly interesting. They point out their guidelines and again use that as a screen, but the fact is they violated each one of them.

"Communications regarding marketing, pricing." We've shown that.

"Communications regarding current or future development." They basically had this agreement and discussed Scorex PLUS and other tri-bureau scores.

"Communications regarding dealings with third-party providers of scoring algorithms, including Fair Isaac." Well, this was all about going after Fair Isaac and it's in document after document.

"Communications regarding members' or other [] products." They basically used each other's products in creating the score.

And then communications to deal or not to deal with a particular category of customers. We've shown that.

Here's the conspiracy evidence, your Honor. We think that this is -- I basically argued **Matsushita** for the Government in support of the position that the Government

accepted and I can tell you this is no **Matsushita** case. This is an entirely plausible conspiracy with evidence.

With respect to the injury to us, your Honor, these are three documents starting from the bottom with a Mercer Oliver Wyman, basically: "Only trying to replace the traditional FICO score"; TU: "Replace FICO anywhere [it appears]"; Experian: "Wanted to make sure that we aggressively pursue opportunities to displace FICO"; and then Equifax: "Do we shoot or milk the cash cow ...?" Well, replace, displace or shoot, your Honor, they're all the same. It indicates that the conspiracy was focused against us and that we have standing to challenge it.

And, your Honor, I just would leave you with these cases and particularly the **ES Development** case from the Eighth Circuit. Very much on point. It involved a bunch of competitors getting together to exclude somebody from the marketplace, hired a lawyer, tried to engage in things that they could on their own, but the court said that that was an illegal conspiracy and found accordingly.

This is some evidence of the adverse effect on competition, the importance of data competition, an indication of the importance of scores generating data competition, and finally the notion -- and this is in the Robida deposition -- that the parties went through and discussed their black box, their deepest, darkest secrets.

And I'd also ask your Honor to look at their IP agreement, where they basically -- even those are the deepest, darkest secrets, justified unusual security precautions, basically they expressly reserve the right for each of them after looking at the deepest, darkest data secrets to take it back to their own shop and use it. It expressly says you can take that data -- you can't give it to a third party, but you can take it back to your own operation and use it. So it's like Coke and Pepsi getting together, sharing their formulas with the cooks, the head chefs, soda chefs, and then basically allowing them to go back to their respective venues and use that information. It's clearly anticompetitive.

We've got some of the statements about what they shared and about the fact that any changes in the score basically requires unanimity, which means that if I come up with a new data element that I want to include in the VantageScore, my other two competitors can prevent me from using it.

Finally, this NAMB letter, your Honor, I just would call your attention to it, because it talks about some of the concerns that National Association of Mortgage Brokers, one of the principal consumers or trade groups, had with this arrangement, basically indicating that: "whether the change is designed to eliminate or replace the current use of

Classic FICO scores or whether it represents a better" score. That was unclear to them.

But what's most important, your Honor, is this statement: "Most significantly, it is unclear what benefit is gained by consumers in having this new System, which is perceived to simply repackage an existing product and injects uncertainty and confusion into the market."

THE COURT: Okay. I think you're beyond your time.

MR. RULE: Okay. Thank you, your Honor.

THE COURT: I'll hear from Mr. Milne ten minutes with regard to his reserve time.

MR. MILNE: Yes. Thank you, your Honor.

Boy, Mr. Rule talks fast and I think there's a lot of double talk in there, but let me just -- let me just start with -- he said a lot of things.

I didn't hear him answer your question about damages because I don't think there is an answer.

I don't think I heard him answer the question of how there is any kind of real or immediate threat to Fair Isaac's continued corporate existence. No answer to that because there isn't one. We're not using the Equifax preferred partnership as proof of the lack of conspiracy. There's no evidence of conspiracy.

The significance of that agreement is the fact that

it preserves Fair Isaac's future. The very things they say they're threatened by as a result of this collaboration, things like not having access to data and the like, those things are -- first of all, it's preserved by the Equifax agreement and he didn't come up here and say that there was any real threat to them going forward except to say, oh, well, maybe, just maybe in the future once the lawsuit is over they may change their conduct. But it's very clear in the cases that we cite in our brief, Judge, that speculation about the future is not enough to grant summary judgment, or to defeat summary judgment.

And, you know, he talked about the Experian cancellation of a consumer agreement. Well, yes, they did that. That was a small business dealing in terms of the overall relationship between those companies and Experian renewed the major distribution agreement between the two companies despite the lawsuit and TransUnion has continued on throughout this process with a very cooperative relationship with Fair Isaac. And so there's just no basis to believe -- first of all, the bureaus are acting in very different ways, so the suggestion that their activities with respect to data or distribution are somehow evidence of some kind of coordinated conduct or, as Mr. Rule just said at the end, some kind of coordinated conspiracy to kill Fair Isaac, it just doesn't make sense. They're all over the place in terms

of their individual activities, which you would expect in a competitive environment.

Now, one thing that's also worth observing here about what Mr. Rule said is, the basic thesis here is that the bureaus somehow have it out for Fair Isaac and they're going to drive it out of business in some way, shape or form. How is that likely to be achieved where there's no allegation of conspiracy with respect to denial of data, where the data dealings continue, and where the basic thesis of the conspiracy is we're going to price VantageScore high in relation to the FICO score? I mean, it's undisputed in this record that lenders do not switch and it's lenders that drive this marketplace. The consumer business is really a follower. It's where -- the money is where the lenders are and that's what drives the business.

How is it -- and it's undisputed that lenders will not make a switch without extensive testing. They're not going to switch to a new scoring system without doing these extensive statistical tests. Everybody recognizes that. So if VantageScore isn't as good as Fair Isaac, it's not going to get accepted, and if it's priced too high, it's much, much less likely to be accepted by lenders. So what kind of conspiracy to kill Fair Isaac is this, a conspiracy to price VantageScore high? It just doesn't make sense.

And the idea that -- you know, Mr. Rule got up here

and said it was completely irrational that the bureaus would not have in effect given away -- because the marginal cost of this scoring product is basically zero once you develop the algorithm. You know, it doesn't cost much to generate each incremental score. So his basic position is that absent conspiracy you would see the bureaus giving it away. He says, he concedes that what we're talking about here -- first of all, that just doesn't make sense from a business perspective and you can't rule out the possibility of independent conduct, that an individual bureau looking at this would say: Hmm, you know, we have what we think is a good score here. We think it outperforms the FICO score and the FICO score is the benchmark out there in the marketplace. Well, let's see if we can price it at around that level and then we'll tell customers: Look, you're getting more for it. It's more predictive. It's a good deal for you. Is that irrational? That's commonsense business conduct. It's hardly irrational. And because we're talking about a relatively concentrated market with only three sellers, the cases -- and we cited them, including the **Blomkest** case -- talk about how it is expected in a concentrated market that pricing will not mirror a marginal cost, that it will be higher than marginal cost, without conspiracy, without any illegality.

He talked a lot about value proposition.

Basically, in the absence of evidence of actual agreement, what they're stretching for is to find some link -- and before I even get into that, I just want to make clear: You can and you should grant summary judgment on the failure with respect to damages and injunctive relief. Customers -- customers aren't in here suing. They include some of the most sophisticated financial institutions in the world. The Government is not in here suing on behalf of some public interest. The DOJ actually did look at this arrangement and concluded its investigation with no action.

So what you have is a competitor here. They haven't satisfied the requirements for antitrust injury, they have no standing, and so you never even need to get to the next level, but there is an absolute failure of proof on the issue of agreement. Where is the evidence? Where is the evidence that value became some kind of code not just for price, but for a price floor on VantageScore? Not a scintilla.

And when you look at the documents, when you look at the documents -- they have two categories of, quote, unquote, value documents that they include in their papers. One is the category of documents that reflect the joint venture discussions. And again, they're in a collaborative venture to have a new product. You have a new product, you're going to talk about -- you have to have a message for

what that product does. What is it? Is it a better product? What does it do? What are its attributes? And when you look at the documents that talk about value proposition, that's what they're talking about. They are talking about the attributes of the score. That's category one.

The other category is the internal bureau documents and we just talked about that. The idea that a bureau internally would say to itself: Hmm, I have a score, it's got these attributes. How am I going to price it? And yes indeed it's true. This isn't something that's problematic, that some of the bureaus had independently reached a decision that they at least aspired to have a price that would come close to the FICO score and that would mirror the value -- it's common sense -- would mirror the value of the product.

But what's key here is, you know, if there really was a price fixing conspiracy to set a floor for VantageScore pricing, you would expect to see -- first of all, you'd expect to see some indication that they were enforcing the agreement and all these low prices. You didn't hear him dispute the existence of all these low prices and how they were extended to lots and lots of customers, somebody saying, "Hey, what's happening here? The conspiracy, nobody's following it. It's breaking down." Nothing like that. You don't see that.

But the other thing you would not expect to see

would be -- it's an absolute floor, remember? You wouldn't expect to see policies that would allow for discounting, and we attached the documents to our papers.

In the case of Experian, they had a policy that gave even field sales level individuals the freedom to offer 30 percent discounts on VantageScore without getting anybody's approval. You could get a 40 percent discount just with a district manager's approval, and if you wanted to go to 50 percent, yes, at that point you had to go to a vice president.

THE COURT: Okay. I think that's going to be the final word on the antitrust.

MR. MILNE: Okay. I would just add, your Honor, we put the detail -- the whole issue of shredding, we address it in the brief. They haven't even attempted to satisfy the requirements for an adverse inference and it's not even close on each level of the test for that.

THE COURT: All right. I think any remaining questions I have will be answered by reference to the briefs, so we'll take a ten-minute break and then move ahead to the trademark claim.

(Recess taken at 10:15 a.m.)

* * * * *

(10:30 a.m.)

IN OPEN COURT

THE COURT: All right. Please be seated and we'll proceed to talk about the trademark claims, which are Counts 1, 2, 3, 4, 5, 6 and 7.

And let's see. I guess --

MR. GLANCY: Good morning, your Honor.

THE COURT: And you're Mr. Glancy, is that --

MR. GLANCY: Glancy, yes. Christopher Glancy from White & Case and I'm here to speak on behalf of all defendants in support of Defendants' motion for summary judgment on both the trademark infringement claims and the false advertising claims. I'll address first the trademark infringement claims.

There are two essential elements in every trademark infringement case, and that is that the plaintiff must prove ownership of a valid trademark and likelihood of confusion.

Now, with respect to the claims that are based on the 300 to 850 score range, we have moved only with respect to the first element, ownership of a valid trademark. We contend that they do not own a valid trademark. I'll address separately later on the keyword advertising claims.

Trademark protection is only afforded to distinctive marks and there's a good reason for this. No company should be allowed to monopolize common descriptive terms and prevent competitors from using those same terms to fairly describe their own products, or else otherwise

companies could lay claim to all the words in the dictionary or, as here, to entire ranges of numbers and prevent competitors from using those terms or those numbers to fairly describe their own products.

Now, the determination of validity here is really a two-step process. First is determining whether or not where 300 to 850 belongs on the so-called "spectrum of distinctiveness." Your Honor may be familiar with it. The low end is generic marks, which are not protectable, then descriptive marks, which are not inherently distinctive, then suggestive marks and arbitrary marks and fanciful marks.

Now, descriptive marks are -- the courts are very clear about this -- a term that immediately describes the ingredients, qualities, characteristics, effects or other features of the goods or services at issue. A descriptive term doesn't need to bring to mind the nature of the goods or services. It just needs to describe a particular characteristic or feature of that service.

So with those definitions in mind, let's take a look at the facts in this case.

And Bryan, if you could show the first slide.

This is a screen shot of the Fair Isaac web site, and if I may approach, I have hard copies for the Court.

THE COURT: Okay. Please.

MR. GLANCY: And one for opposing counsel.

This is a screen shot of the myFICO web site which shows that -- exactly how Defendants use 300 to 850.

Toward the bottom in small type there, you can see it says: "FICO scores are your credit rating. They range from 300 to 850, higher is better." So the question before the Court then is are Plaintiffs using 300 to 850 to describe a feature of their services, and I submit to you that there's only one possible answer: Of course they are. No reasonable jury could conclude otherwise. It is a descriptive term.

Now, in response to this the plaintiffs have relied on their trademark registration which they secured from the Trademark Office, but does the fact of a registration defeat summary judgment here? No. The cases that we've cited in our brief clearly support that.

And indeed, it's important to see that the trademark examiner initially rejected the 300 to 850 application on the ground that it was descriptive. That was a proper objection. But what did Fair Isaac do in response? They hoodwinked the trademark examiner basically in an exercise of misdirection. Fair Isaac argued that this was not descriptive, this was arbitrary, and why? Because the mark was arbitrarily selected. But that's a specious argument. It matters not to any consumer how the mark was actually selected. The question is what is the relationship of the mark to the goods or services at issue, and here it is

clearly being used in a descriptive fashion to describe a feature of Plaintiffs' service.

Now, it should be noted as well that Plaintiffs hardly chose this mark arbitrarily. It wasn't plucked out of thin air. They had these algorithms that spit out a result that range between 300 and 850 generally. It is an apt descriptor of the actual results from those algorithms.

Now, the second step in this analysis is, because it's a descriptive mark, the question becomes, well, have they demonstrated or can they demonstrate secondary meaning. That is to say, can they demonstrate that consumers have come to associate 300 to 850 exclusively with Fair Isaac and view it as a trademark and not merely a description of a feature of the service. Without secondary meaning, the trademark isn't valid. Plaintiffs have produced no evidence of secondary meaning.

Now, Plaintiffs could have gone out into the marketplace and done a secondary meaning survey. They could have randomly selected consumers from around the country and asked them: What do you think this -- what's the significance of this 300 to 850 range to you, but they didn't. Defendants did and Defendants have produced their own secondary survey and that survey clearly shows that only two percent of customers even recognized or thought that it was a -- that a score with that range originated from a

single source, and only two out of 300 respondents identified Fair Isaac as that source.

Now, I did want to turn briefly to keyword advertising as well. Keyword advertising your Honor may be familiar with. It's a common advertising practice where advertisers purchase keywords, which can be common terms or trademarks, in the hopes that when search engine users type in the keyword into a search engine, that their ad will appear on the screen next to the natural results of the search, and it's usually in a part of the screen that is set off to the side and is identified as advertisements or sponsored links.

How common is this practice, really? Well, it's so common that Fair Isaac has purchased Experian's trademark and TransUnion's trademark and VantageScore's trademark and Equifax's trademark.

And Brian, can you show that screen?

This is a list of key words that were purchased by Fair Isaac to promote their own services and you can see all of the trademarks of the defendants here. And on the next screen in the middle there, it's a little bit hard to make out, but there's a keyword purchase for "vantagescore fair isaac."

Now, the facts on the keyword advertising issue are not in dispute either. For a time TransUnion and Experian

both purchased FICO as a keyword. Neither one of them used FICO in the visible text of the ad that was linked to the keyword. So the question for the Court is whether under these circumstances as a matter of law there can be no liability for trademark infringement. Two courts have addressed this issue and determined that under these facts there is no liability for trademark infringement. No court has ever found liability under those facts and circumstances.

And before I move on now to false advertising, if your Honor has no further questions -- no questions, I'll move on.

THE COURT: No, I think you can move on.

MR. GLANCY: Okay. Thank you.

Now, with respect to the false advertising claims, as we set forth in our brief, Plaintiffs have not opposed many of the claims that -- Defendants' motion with respect to many of the advertising statements that they initially alleged in their complaint, so as to those statements there should be no question summary judgment is appropriate. What remains in the case are three categories of statements and I'll walk through them for you in a moment.

The first category is that VantageScore is, quote, more predictive, close quote, than other scores. The second is that VantageScore is, quote, used by lenders, close quote. And the third is really a group -- large group of statements

that Plaintiffs contend all convey the message separately, that Experian's PLUS score and TransUnion's TransRisk and VantageScore are used by most lenders.

Now an essential element to any false advertising claim is, it's axiomatic that the defendants have made a false statement of fact, and there are two -- the courts are very clear on this. There are two types of false statements. There are literally false statements and then there are implicitly false statements, false statements that although literally true or ambiguous convey a misleading message.

Now, the plaintiffs have alleged that these statements are literally false and literal falsity can be decided as a matter of law. There are no material facts in dispute here. So let me walk through these three categories.

First, the more predictive claim. Now, the burden is on the plaintiff to show that that is a false statement. That is to say that VantageScore is not more predictive than other scores in the marketplace. As I say, the facts aren't in dispute. Both the plaintiffs and the defendants rely on the exact same evidence. We're both looking toward these validation studies, many, many validation studies done by the defendants and done by lenders out there in the marketplace comparing VantageScore with other scores.

Now, Defendants' expert concluded that these tests show that VantageScore is overwhelmingly more predictive.

Lenders have done their own tests. They've concluded the same thing, that VantageScore is more predictive. Plaintiffs hired their own expert and Plaintiffs' expert couldn't say whether or not it was more predictive, so that testimony doesn't get them where they need to be. That testimony doesn't say that VantageScore is not more predictive than other scores. And in fact, he acknowledged twice in his expert report that on their face the results of those tests demonstrate that VantageScore is more predictive. So curiously, or perhaps not so curiously -- oh. I should mention there's no dispute also that these scores measure predictiveness, that the tests were accurate -- were properly done and that the results were accurately reported. All of that is not in dispute.

So, as I was saying, perhaps not surprisingly, the plaintiffs in their paper do not rely on their expert to try to defeat Defendants' motion. Instead, they attach to an attorney declaration some excerpts from some of these tests, and these excerpts, sure enough, show that VantageScore is not more predictive than every other score in the marketplace in all circumstances. But that is not ever what any of the defendants have ever claimed. We never claimed that VantageScore was the most predictive score. We never claimed that the VantageScore will always beat every other score in every circumstance. We just say that generally speaking it

is more predictive.

THE COURT: Than what?

MR. GLANCY: Than other scores in the marketplace.

And to the extent that there's an ambiguity about whether or not we're comparing it to all other scores or some other scores or most other scores, well, that ambiguity means that this statement is not literally false. It means that it's misleading and it was incumbent upon the plaintiffs to come to court with a survey and they didn't do it. They had two and a half years to do it and they didn't do it.

THE COURT: What's your authority that they're required to have expert surveys in this area?

MR. GLANCY: Well, in the cases, **United Industries** and the other cases we cited in our brief, it makes it clear that when a statement is ambiguous it is, quote, critical, close quote, from **United Industries**, that Plaintiffs demonstrate that the, quote, advertising actually conveyed the implied message and thereby deceived a significant portion of the recipients.

THE COURT: Doesn't say expert survey, however.

MR. GLANCY: The cases say that this is usually accomplished through survey evidence. It doesn't foreclose, I suppose, other forms of evidence, but they haven't come forward with any evidence that a significant portion of recipients perceived the message that they allege and then

were deceived by it, and that's their burden. So the facts aren't in dispute and it's just a failure of proof on this issue and summary judgment is warranted.

Now, briefly turning to the used-by-lenders statement, I think this is easily disposed of. They just haven't pointed to any evidence that shows that VantageScore wasn't used by lenders when that statement was made in October of 2006, and nobody disputes the statement is true now. VantageScore is used by many lenders.

Now, the third category, finally, is the claims that are made about TransRisk and PLUS scores and VantageScore that Plaintiffs argue all mean that these scoring services are used by an appreciable number of lenders.

Now, what are the accused statements at issue? There are numerous statements alleged in the complaint. The ones they've called out in their brief I suppose are the ones they view as the most significant, so I'll turn to those.

At page 34 and 35 of their brief they accuse TU's statement that: "Most lenders would view your creditworthiness as" such and such. And they accuse Experian's statement that: "Know where you stand no matter which credit bureau your lender checks." And they accuse VantageScore's statement that: "Most lenders offer their good rates to consumers in this category," referring to a

particular scoring category of VantageScore.

Now, none of those statements say that our score is used by an appreciable number of lenders or used by most lenders. Their allegation with respect to what is insinuated has changed over time and I invite the Court to review the statements and we have a couple here on slides.

And, Bryan, if you can -- this is Experian's web site. They say that -- when we say: "Do you know your credit score?" what that really says is: "Our score is used by most lenders."

Bryan, can you show the next one?

This is a page from Experian's PLUS score purchasing page where on the top it says: "See the score" -- "See the same type of score that lenders see." That's true. These are three-digit credit scores that tell you what your creditworthiness is and there's just nothing false in that statement.

Now, if -- again, the plaintiffs were required to come to court with actual evidence of consumer deception, which they haven't done. They haven't done a survey to show that people were misled by this, so we feel that summary judgment on this issue is warranted. Again, it's a failure of proof.

Thank you, your Honor.

THE COURT: Before you sit down, I would like you

to address a couple remarks, backing up to the world of trademark for just a second, on the estoppel argument as it relates to Experian and TransUnion as licensees and what your reaction is to that.

MR. GLANCY: Well, first of all, VantageScore -- nobody I think can contest that VantageScore is not estopped to raise the argument.

With respect to TU, they have a written license agreement that does not estop them. The plaintiffs are claiming that there is an implied license, but the terms of the license agreement itself sort of forecloses the idea of an implied license, and not only an implied license to use the range, but then an implied promise not to challenge the range is just not sustainable.

And then finally with respect to Experian, it's true they snuck into an addendum this 300 to 850 scoring range as -- into the master agreement. No additional compensation was paid for this. It was registered as an optional trademark, optional for Experian to use. It was part of an addendum that addressed other issues. It was really sort of just slipped in there, we believe, to support their litigation but certainly well after they claimed to have had trademark rights in 300 to 850.

THE COURT: All right. Thank you.

MR. GLANCY: Thank you.

THE COURT: Mr. Schutz, I'll hear you with regard to the plaintiffs' position on the Lanham Act issues.

MR. SCHUTZ: Your Honor, I have a couple slide decks. May I approach?

THE COURT: Okay. You both chose blue backings to further confuse me.

MR. SCHUTZ: It's a popular color, Judge.

THE COURT: All right. It's been tested to be soothing or something?

MR. SCHUTZ: I guess so, persuasive and soothing.

(Laughter)

THE COURT: Oh. All right.

MR. SCHUTZ: Counts I through VII are at issue here, Judge, and we'll just start with an overview of what those counts are so that we've got the 30,000 foot view.

What's important here and I'll get to in a minute is, of these seven counts, there is absolutely no attack on the passing off counts, and I'll talk about that next. It's important to understand what the defendants do not argue.

They are not challenging and they submit no basis for dismissing our passing off, the deceptive trade practices count or the unjust enrichment counts, 4, 6 and 7.

They also, as counsel has admitted, don't challenge the trademark case on the likelihood of confusion aspect. It's centered solely on whether the mark is valid, in other

words, whether it's a descriptive mark.

And on the false advertising, they don't challenge whether that advertising has actually misled consumers. They just go to the falsity prong.

So, what do we need to defeat this motion here, Judge? Here's what we need on each of the aspects.

On the 300 to 850 marks, all we need to show is that there are material issues of fact as to whether they are material descriptive, but we've got several fire walls in this trademark count, Judge. In fact, we've got three separate fire walls here: the descriptive firewall, we've got the secondary meaning firewall, and then we've got the estoppel firewall.

On the false advertising, these claims are literally false, and even if they're not literally false, we have another firewall, and that's that there are material issues of fact as to whether they are misleading.

On the keyword advertising, the issue here is whether they're used to generate advertisements in commerce and then with regard to the advertising claims about VantageScore attributes and usage, there are clearly material fact issues on whether they were literally false.

You will see, Judge, as we walk through the evidence here that there is a pattern of deceptive conduct that is present in almost everything the defendants do and it

overlays all the causes of action here in Counts 1 through 7. They intentionally copied our marks, they prominently use this numerical content, they make false statements about their own scores, they use our terms for paid Internet terms, and then they fail to disclose the true nature of their own credit scores.

Let's cue now to this ad.

(Video played)

MR. SCHUTZ: Judge, that is an ad by Experian, and it's just one example that hits all these areas of this pattern of deceptive conduct here. It's an intentional copying of our 300 to 850 mark. They said, you know, 450 to 850. That's certainly confusingly similar to our mark, constitutes trademark infringement.

They prominently use that numerical content.

They also include false statements about their own credit scores. The numeric reference cannot be to their advertised PLUS score, because what they do is, when you click and you go to that web site for Experian, freecreditreport.com, it's the PLUS score, Experian's PLUS score that they try to sell you. It doesn't go to 850, so they mislead on that.

THE COURT: Would this be a different case if their scores were 30 to 85?

MR. SCHUTZ: If their scores were 30 to 85, Judge,

we wouldn't be here.

THE COURT: Okay.

MR. SCHUTZ: At 30 to 85, it doesn't overlap the range, doesn't have that, but that's not what they chose to do and we'll get to why they explicitly chose to do what we do. Let's talk about the passing off claim.

THE COURT: Do FICO scores ever end in, the three digits, in anything other than zero? Do they make a gradation beyond the 10?

MR. SCHUTZ: You mean like 721, for example?

THE COURT: Yes, as opposed to 720.

MR. SCHUTZ: I believe so. I don't think there's any -- I guess the technical question I would have to look into, but I don't think there's any reason why they couldn't add in something less than zero.

On the passing off claim, Judge, the Minnesota Deceptive Trade Practices Act has several provisions, four of which we've cited here, that they violate.

It's also important to note that for the Deceptive Trade Practices Act claim, there's no requirement that we have a trademark. I mean, it can just be the activities that are described here. It's a very broad, protective statute. And even though there's some overlap with the Lanham Act, there's no requirement for a trademark here and they don't address that at all, so that claim survives this hearing no

matter what happens on everything else.

Let's now talk about their infringement of the 300 to 850 marks. Again, it's based solely on the fact that they think the marks are descriptive. Let's look at what they do here, Judge.

If you take a look at this particular document, which I think comes from TransUnion, they are using our mark. I mean, this is the scale that they put out there. They aren't even trying to tweak it at all so it doesn't hit 300 to 850. They put the 300 to 850 mark right out there.

Here's another document from Truecredit, which is again a TransUnion document. They've got the scale set forth here again.

If we go to an Experian document, what we see is Experian's in-house score range, 330 to 830, and you'll see some documents that will come up here in a minute as to why they chose that range, but 330 to 830 is certainly confusingly similar to our 300 to 850 marks.

We've got some further evidence of the way that Experian uses its marks on the next slide here, Judge, again, all within the 300 to 850 marks.

Now let's go right to the heart of the issue of descriptiveness. Counsel set forth what's a pretty standard designation of how marks are classified. The focus here is on the **Woodroast** -- Shelly's **Woodroast** case on what's a

descriptive mark. A descriptive mark according to that court, quote: "immediately conveys the characteristics, qualities or other features of a product ...." Well, our marks are not descriptive. We have four registered trademarks. They're deemed to be inherently distinctive and thus qualify for trademark protection. And in fact, the issue that came up in the Patent Office, in the Patent and Trademark Office when these marks were under consideration, the Patent and Trademark Office initially rejected the marks on the basis that they were descriptive, and that argument was overcome and it wasn't overcome by hoodwinking the trademark examiner whatsoever if the Court goes -- and it's part of the record -- and looks at the prosecution history of those marks. So we have valid marks where this issue was addressed and rejected.

Defendants' contention boils down to this, Judge: They say that it's beyond dispute that 300 to 850 describes a characteristic. Which characteristic? Upper and lower boundaries. Well, that's simply not accurate. Three hundred to 850 does not describe the upper and lower boundaries of our range of possible scores. Mr. Collyard in his exhibit lists several -- an exhibit to his affidavit lists several different types of the various Fair Isaac scores and the ranges are not 300 to 850. They lap over the ends on both sides.

The defendants admit that the numeric scale is merely cosmetic.

And -- this is important, Judge, and we're going to explore this next -- there's no competitive need to use 300 to 850. So from a public policy standpoint in terms of the public policy of giving a mark to someone that would put a competitor at a disadvantage or pull something out of the public domain that couldn't -- like the term "apple" for "red fruit," for example, that's not what was done here.

This is a slide that Defendants used claiming that we're using our mark in a descriptive context. Well, that's simply not true, Judge. If you look at the entirety of this ad, you see where the arrow is there's a reference to 300 to 850, but you will also see that our trademark is very prominent in here. And when we filed on the first application, which is 300 to 850, without any adornment or seal, it was an intent-to-use application and the evidence of the use of that without any adornment -- you'll see coming up here on the screen. This is in fact what we showed the Patent Office for what I'll call the naked 300 to 850 without any adornment, was in fact this one with the seal as the intent to use. So the seal is not required. We have a trademark simply without the seal.

So let's look at some additional case law and some examples of what are descriptive marks and what are not

descriptive, all right?

Again, from the Shelly's **Woodroast** case: "Descriptive marks immediately convey the 'characteristics, qualities or other features of a product'...."

Here are examples from McCarthy's treatise on trademark law on descriptive marks, okay: Frosty Treats, Beer Nuts, Car-Freshener, Bed & Bath, Honey Roast, Itool, Raisin Bran. I mean, Frosty Treats for frozen desserts and ice cream, Frosty Treats immediately brings to mind frozen desserts and ice cream, Beer Nuts for salted nuts, et cetera.

Let's now look, Judge, at what have been viewed as not descriptive, marks that are not descriptive: Roach Motel for an insect trap, Dial-A-Mattress for mattress sales, Florida Tan for suntan lotion, Action Slacks for pants. I mean, Action Slacks for pants, there's a much better argument that that is a descriptive mark than 300 to 850 for credit scores. Three hundred to 850 doesn't meet the Shelly's **Woodroast** test of immediately bringing to mind the characteristics, qualities or other features of the product. Action Slacks arguably does more so. It has been held to be found not descriptive, as are all the other marks here on slide number 20.

Here's another example from the **Tanel** case, your Honor, involving the mark 360° for I believe it was

basketball shoes. Again, it's a number mark and even though it describes the circular shape of the cleat on the shoe being sold here, the court in that case found that it doesn't meet the criteria to be descriptive and that trademark was allowed as valid.

Then, Judge, we get to the second firewall here on the trademark case, which is that even if the Court were to have some concern that the marks were merely descriptive, there are certainly then material issues of disputed facts as to whether they've acquired secondary meaning. There are many ways you can show secondary meaning in the case law. You do not have to use a survey. You can use defendant's intentional copying, for example, and evidence of consumer confusion, both of which we've done in the brief and I'll show you here.

THE COURT: Doesn't evidence of consumer confusion require some sort of survey or expert, though?

MR. SCHUTZ: You can show that by a survey or you can show it by direct actual evidence and we have direct actual evidence that we're going to get to here in a minute, your Honor.

On the issue of copying, if we look, these are documents from each of the defendants here and they're referenced, the Court can look them up, but what did each of the defendants do here? Let's look at the first call-out:

"I think we should use the range 300-850 to be completely compatible with the FICO scale (which is what we are trying to mimic)." There is no statement here they picked, one of the bad guys picked 300 to 850 because they needed it for competitive purposes. They basically wanted to rip Fair Isaac off and that's what they did.

The next document: "Simplify wording, mirror FICO for ease of adoption, or as agreed by team." Again, intentional copying.

Then we go down to the next call-out: "FICO's score range is 350-850. We wanted to keep it close, but not exactly like FICO's." I believe that's from the Experian documents, your Honor. Remember that their PLUS score is 330 to 830. So they looked at that, they didn't want to copy it exactly, but they wanted to be close. And they didn't want to be close for any competitive reasons. They wanted to be close because they wanted to trade on Fair Isaac's goodwill and the fact that people associate 300 to 850 with Fair Isaac.

And of course, same Experian document here: "Based on the new score model the lowest and highest possible score is 424 to 818," so they picked the range again not descriptive of anything, not of their actual scores, but 330 to 830 because it was close to Fair Isaac.

We've got another document here, Judge, that

illustrates in as clear a way as you can that there's no need to pick 300 to 850 for competitive purposes. This is a document that shows what a score is, but if you want to see it on a zero to 100 scale, it's on a web site, you can click here and you can get a zero to 100 scale. So there are clearly other scales that the defendants know about, considered, and rejected.

Let's now go -- there's some additional information here, Judge. Did I jump ahead too far? Zero to 100.

Then we go to Project Trident, Judge. One of the things that happened with regard to Project Trident was a survey, a poll, rather, gathered by the Gallup organization to determine what score range should we pick. And they conducted this poll and Question 2 was: "As you may know, a person's official credit score goes from a low of 330 to a high of 830. Would you find it more useful for the score to go from 0 to 100, would you prefer the score remain as it is," does it matter to you, et cetera. "More consumers prefer the 0-100 scale." So notwithstanding the results of what consumers would rather prefer and that you can in fact use zero to 100, there's no competitive reason to go 300 to 850. They chose a score range that's confusingly similar to our mark.

Now, we've also got evidence of consumer confusion, Judge. This document is a script from Experian that they

gave to the people operating their -- at the customer call center because they'd gotten so many questions regarding confusion about the FICO score with their own score that they had to come up with a script for their people to use. And as you can see here, you know, they were getting calls and they are anticipating -- not anticipating. They'd gotten so many calls about the confusion that they had to come up with a script for their people to use on how to address that.

Here's another piece of evidence, Judge, briefly, on the consumer confusion that talks about most of the time when people are calling they're not asking about the Experian score, but FICO comes up a lot.

Further evidence of consumer confusion from TransUnion. This is again out of Exhibit 6 of Mr. Collyard's declaration. It has a lot of excerpts showing what happens, what kind of calls they're getting: "Customer thought it was a FICO score," "TransRisk vs. FICO, thought he bought FICO from us, referred him to [different] website." VantageScore, same type of evidence, Judge. And we just pulled a couple excerpts out here. There's a lot more in the exhibits.

Then we have a document from TransUnion that basically admits that there's an incomplete description of the scoring offered on their site. "Some customers believe that the score that they are receiving is the Fair Isaac ... score."

THE COURT: I think I better move you to false advertising.

MR. SCHUTZ: I think so, Judge. I think the point here remains. Let's move on to -- briefly on the estoppel issue, Judge, because you asked opposing counsel about that. There's a contract with Experian. There's an implied license with TransUnion. We talked about that in the slides and in the brief.

Now, with regard to VantageScore, we haven't found any case law on this one way or the other, but there's a matter of equity. Someone's agent -- in other words, VantageScore is nothing more than a joint venture between all these parties. They should not be able to create a joint venture what they themselves do not do, so they should be estopped. So that's the three firewalls.

Let's go to the false advertising, Judge. It's on slide 35.

The advertising claims in fact are literally false, and if not, there's certainly a question of fact as to whether they're misleading.

The test here, of course, involves falsity by implication, but let's go on to see the different types of claims that we're talking about. We've got the lender claims.

So here's an example of a document where they say

the score that helps lenders decide whether they can give you a loan.

We have the same thing from another Experian document, same type of score that lenders see.

And we've got another document here from -- I believe this is from TransUnion again saying this is from the lender's perspective.

Another document, this one I believe from Experian, same thing, the lender's check. We can go through these quite quickly. We put several of these examples up here, Judge, where they are basically saying our scores, "our" being the defendants, in-house scores are what lenders use, and we've cited to the brief evidence that that's just simply not the case and lenders don't use that. In fact, I believe the Experian score is not used by any lenders and the TransUnion score is used by like one percent.

And with regard to the VantageScore, at the time the statements we allege were made, VantageScore was in fact not being used by any lenders. It is today, but at the time the statements were made it was not.

And I've got a few minutes left, Judge, so let's move ahead in the interest of my being cognizant of the Court's time briefly on the keyword advertising.

It's undisputed here that, you know, Experian has used the FICO mark and Fair Isaac in its keyword advertising.

And there are some material issues of fact regarding TransUnion's use of the FICO mark, but it's undisputed they use 850 as a keyword.

The cases in this area -- and the Court's aware of this from reading it and I know the Court had the Hysitron case. Around the country they're breaking down to two camps. If you buy keywords, is it use in commerce? And at least two courts, I would submit, in this district, two judges in this district have said yes, and there are some other districts around the country where the courts have said no. If you come down that's a use in commerce, they've in fact done that, and we cite a lot of evidence -- some of it's in the deck here, Judge -- where we show -- this is, for example, the documents that we got from Google showing what Experian bought, they bought these marks. We've got TransUnion in fact buying some keyword advertising here. You can see a screen shot that the FICO score is put in and what comes up on the screen is a paid link to a TransUnion site.

Now, they've made an argument in the brief -- it's kind of subtle and I'll just touch on it briefly -- that there's a TransUnion site that actually sells a FICO score and that therefore they have authority to, you know, buy our mark to use to sell in fact a FICO score on their site. While that may be true, that's not the case for this particular site, which is, if I can read this right,

truecredit.com. There's another site -- and I can't remember, it ends in .cs, I think -- where they sell FICO scores, but not on this site. This link is to in fact try to sell a TransUnion score. And then we have the evidence here of the keywords that they actually purchased.

VantageScore attributes, Judge. Very briefly finishing up on just the last couple of points here on predictiveness. It's the last slide.

On the comparative predictiveness of VantageScore, they are literally false. I mean, the statement is -- and I wanted to make sure I've got it right. This is another -- to quote the record here, this is from Exhibit 25 of the --

MR. SCHUTZ: Is this in the complaint, Mike?

And there's a statement, one of the things we quote, where Barrett Burns, who's the CEO of VantageScore, said: "The new score has the advantage of being based on fresh data making it more predictive than what's in the market." So that's what they claim.

There are 232 tests, however, showing either FICO or a bureau in-house score beating VantageScore. We cite the record on that, so the statement is in fact literally false and was literally false when made.

With regard to the used-by-lender statement, as I mentioned earlier, at the time the statement was made it was false because the first national lender did not adopt it till

2007.

I think I hit about 20 minutes, Judge. Thank you. Unless you have any questions, thank you very much.

THE COURT: No, that's fine.

Mr. Glancy, I think you have a few minutes left in rebuttal.

MR. GLANCY: By my count I have about four or five minutes left. Thank you.

Just to briefly address false advertising, because I didn't hear anything in there that was different from what are in the briefs, but on the question of estoppel and whether VantageScore is estopped by virtue of its relationship with the other defendants. There is no allegation here that there's any privity with respect to any contractual relationships between the other defendants and Fair Isaac and certainly they've made no effort to pierce the presumption of corporate separateness that attaches to every corporation.

Now, turning to the trademark infringement claims, the emphasis, really, for them is on the fact that the defendants copied the scoring range, but the argument is really circular. If there's nothing protectable in the scoring range, of course the defendants are free to copy it. In fact, competition encourages copying of unprotectable matter. It's the essence of fair competition, not unfair

competition. So to say that because we copied it it must be protectable is really putting the cart before the horse.

Now, you mentioned 30 to 85, would that be an acceptable scoring range. It would not be a possible scoring range because simply lenders or computer systems are geared toward three-digit ranges, and of course three-digit --

THE COURT: 30.0?

MR. GLANCY: 30.0 puts a decimal point in there. And certainly a three-digit range gives you a greater degree of precision and having a 721-type score.

Now, with respect to the descriptiveness of the mark, it should be pointed out that the seal marks, nobody's alleged that we are doing anything like a seal here, and the fact that they put their descriptive mark in a seal of course doesn't make it protectable either. They put other things in there, in that seal, like "officially certified." Is that now a trademark of Fair Isaac? They take other words and put them in bold, like "free." That doesn't afford them trademark protection. The question is whether or not as applied to these services it is descriptive. It is unquestionably a description of the scoring range of the service and for them to suggest that it's not because somewhere back in the back room the scientists can tell that the absolute minimum and absolute maximum don't exactly match 300 to 850 is really specious. Consumers don't know what's

in the back room at Fair Isaac. Consumers see what they're doing with the mark and they see them describing their scoring range as 300 to 850, and that's all that matters here is what consumers perceive the mark to be, not what somebody in the back room at Fair Isaac says.

Their 360 degree case, just a brief comment on that. The product at issue there was a shoe. It wasn't the cleat of the shoe. So 360, circular, the shoe wasn't a circle, so it wasn't descriptive of the product.

Now, with respect briefly to the consumer confusion evidence, if you take a look closely at that evidence, not only is it hearsay for the reasons we stated in our brief. It is extremely hard to say exactly what's causing this confusion. There's an awful lot of confusion out there about credit scoring generally. Because Fair Isaac is the dominant player in the market, it's not surprising that some people would expect to get a FICO score when they go someplace else. But how is a competitor to compete? How is a new entrant to come into the market and say, "Here we are. We can give you a credit score too" without risking some level of confusion? But their assumption here is that the confusion is caused by the scoring range and there's just absolutely -- that's speculation. There's absolutely no evidence to support it. Now, a survey could have done that, but they didn't do a proper survey, an admissible survey, to show that the

confusion is caused by the scoring range and not by some preconceived misconceptions or general confusion, which is not actionable.

Now, finally with respect to keyword advertising -- briefly with respect to the passing off claim, passing off requires conduct that's likely to cause confusion or deception. The conduct that they've alleged is the trademark infringement and the false advertising. I have never heard them say -- and it's not in their complaint -- that there's some separate conduct that constitutes passing off. So if we're not infringing their trademark and we're not false advertising, then we're effectively competing, and that's what the law encourages.

And lastly with respect to the keyword advertising, the issue here is not use in commerce. That's a smoke screen. That's a red herring. The cases we've cited say clearly after doing an analysis of the use-in-commerce issue that the likelihood of confusion on the trademark, there is no likelihood of confusion in this circumstance and I think a fair look at their printout of the web page which shows the ad that comes up that's associated with the keyword really demonstrates why. You take a look at that and you see on the page there natural results that aren't linking to Fair Isaac and you see that there are some ads that do and some ads that don't link to Fair Isaac. Consumers don't necessarily expect

that everything that they get back in a search hit list is going to relate -- is going to be exactly identical to what they searched for, so there's some amount of discerning that goes on here. Courts have found that unless there's something explicitly misleading in the visible text, that there can be no likelihood of confusion based on simply buying a trademark as a keyword.

And I have nothing further. Thank you, your Honor.

THE COURT: Thank you. That brings us to Counts 13 and 14, the contract claims and bifurcation. Let's see. I'm going to hear from Mr. Gardner, I believe, on that.

MR. GARDNER: Hopefully we're closer to the end than the beginning. I'm going to do this the old-fashioned way, Judge. I don't have a PowerPoint to hand up, so I'm going to stand here and talk and hope that --

THE COURT: It's not going to prejudice you, I can assure you.

MR. GARDNER: -- you will follow me. I've got ten minutes to do all this. I'm going to try to get through the first part in about six or seven and hold three or four at the end if I don't go over my time limit.

This claim is solely against TransUnion and it's a breach-of-contract claim, although it has very similar attributes to it as the rest of the case. There are certain common threads that run through this case and they're shown

also in the breach-of-contract case.

Now, it arises because Fair Isaac sends the specifications to TransUnion for its algorithm on paper. They give us, for lack of a term, the secret sauce. TransUnion then has programmers that program those specifications into TransUnion's computer system and then as a result of that that algorithm gets matched with the data in the computer system, generates a score, in this case a FICO score.

Now, because of that situation it was very important that the parties, particularly for Fair Isaac, that they provide some mechanism to ensure that TransUnion doesn't misuse that data, but at the same time, TransUnion also, in addition to selling FICO scores, sells other scores, so the contract really has two stages to it.

The first stage is we get this data and we have to protect it. It is their secret sauce. There's no question about it. But on the other hand, we do our own credit score. So the contracts specifically contemplate and allow TransUnion to compete against TransUnion and they allow TransUnion to use information that is available publicly and to produce their own scores.

Now, how do we get to where we are today? Actually, this is really the third act in a play and the first two acts didn't come out so well for them.

The first act, and when we were in front of you the last time, although this wasn't part of what was here, the major part of this case at the time seemed to be a claim that VantageScore could not have been developed in the lightning speed, they claim, that it was developed in, so TransUnion must have misappropriated FICO's information, and that was a central part of their case. That was act one.

We had a lot of discovery, we produced the algorithms, their experts looked at it, our expert looked at it, and we finally said to them, "Tell us what it is. What have we taken? What are the trade secrets?" And Magistrate Judge Mayeron said, "Okay, FICO. May 15th is the date by which you have to tell everybody what it is that they did wrong." Well, May 15th came and you know what they did? They gave up. They said, "We don't have nothing. We've got nothing to demonstrate that you misused any of our" -- "misappropriated any of our confidential information." They dismissed that claim with prejudice. That's key to where we are now.

Then what happens next? Next they say: Well, we can't establish that our claim was based on misappropriation, so now let's say that we misused their information.

We take the deposition of their expert, and this is on page 7. I'm going to try to combine here a little bit our separate trial arguments with the breach of contract,

although I will say just in passing, your Honor, the separate trial is a double "what if." It's what if this case is still going and what if we don't get summary judgment here, and we can talk about that.

THE COURT: But if we get there, wouldn't it be nice to do this twice.

(Laughter)

MR. GARDNER: Well, it depends -- no, it would be horrible to do it twice, but the problem is, what they want to do is, they want to try their case twice and we want to try our case once. I mean, we've got a breach-of-contract case and we've got an antitrust case. Let's not try the antitrust case, assuming there is one, in the breach-of-contract case.

So what do we say about misuse, their expert?

Our question: "Do you have any reason to believe that the VantageScore model development team used any information that was confidential to Fair Isaac?

"Answer: I have no reason to believe that they used such information."

Okay. So, act two. That's gone. So now we're back to -- we've gone to our bench and now we're on the third string, and the third string is, okay, maybe here we can make an argument out of the contract. We've got no wrongful conduct.

Now, that's what we're here today to decide, but it's very important, your Honor, to put this in perspective. It's another example of how this case evolves. It's a much different case than it was when it started and this is a perfect example of it.

Now, what you have to look at in the contract initially is the definition of FICO property. There's a very broad definition of FICO property and it basically includes their recipe, their secret sauce. And we don't dispute that the contract says what it says. The question, though, your Honor, is not what that says, but what are TU's obligations. That's what you have to decide, what are TU's obligations under the contract.

Now, they want you to decide that obligation by only looking at one provision of the contract, the contract that says this is our stuff and we own it all. However, they don't want you to look at two very important provisions of the contract.

The first one, I quote -- this is on page 3, page 2 and 3 of our opening brief: "The parties acknowledge that the jointly developed scoring products and services will compete with other non-Fair Isaac developed scoring products."

The second one is: "The contract specifically excludes from confidentiality obligations information

'generally available to the public or independently developed by employees of TransUnion.'"

So here we have this tension here. The tension is, yes, we have to keep their stuff confidential, but what are our obligations in light of the fact that we are producing scores and were we're permitted to do so? The problem with their interpretation -- well, there's two problems with it.

First, as your Honor well knows in deciding a number of contract cases, when construing a contract you got to look at the whole document. You can't just look at the section that they want to look at. You got to look at it all to see what the parties' intent was. So when you look at it all you can see that, sure, they had to protect their property, but on the other hand, we had the right to compete.

Now, their argument basically taken to its point is basically absurd. What they're saying essentially is -- not essentially, they say it. They say we can't use TransUnion data to do a score. We can't use a statistical regression analysis to do a score. Well, that can't be right. I mean, it's as if they -- and I hate to use this example, because I think it demeans the sophisticated nature of what we have here, but I was thinking about it last night. It's like they've got a recipe for a spaghetti sauce and we're making their spaghetti sauce. They've got a great recipe and we can't take their recipe and use their recipe to make our own

spaghetti sauce, and we didn't. In fact, the proof is all to the opposite. They abandoned their misappropriation claim, and their own expert, the only people that could see these algorithms, said, well, there's no reason to believe that we misused any of their information. So what are they saying now? Yeah, go ahead. You can make a spaghetti sauce, but you can't use tomatoes. Well, that's the absurdity of their argument. They're basically saying we can compete against them, but we can't compete against them with the essential nature of what it takes to compete.

Now, what they're also trying to do here -- and this is kind of cute -- is, they're attempting to expand some implied duty of good faith and fair dealing to say, well, what's really going on here, TransUnion is trying to drive us out of business. Well, they've got that in the antitrust case.

In the contract case there are specific elements that are obligations of TransUnion in the contract case. Those obligations set the parties' obligations, the ones we just talked about, about competing, holding their information confidential. There are other obligations and here's there's a total failure or lack of proof that we did anything to not market their scores properly. We sell -- we being TransUnion -- sells more FICO scores than any other score. Those sales have increased since VantageScore. So they don't even argue

this in their brief in terms of arguing with respect to the specific provision. They're trying to take this concept, this elusive concept of good faith and fair dealing and overriding everything.

I'm sure -- and I haven't been keeping track, your Honor, but I'm reasonably sure I probably went over my six minutes.

MR. SCHUTZ: I'm positive.

THE COURT: All right.

MR. GARDNER: And I apologize for that. With your Honor's indulgence, if I have some time --

THE COURT: I was listening and I lost track of time as well, but I agree. You've used it up and we'll give Mr. Schutz a couple minutes extra in response.

MR. GARDNER: Okay. Thank you.

MR. SCHUTZ: Judge, I have a couple of -- a deck. May I approach the bench?

THE COURT: Yes.

MR. SCHUTZ: The only thing that Mr. Gardner and I do agree on is that he's old-fashioned.

(Laughter)

THE COURT: That's not a bad thing.

MR. GARDNER: Is there something wrong with that?

THE COURT: I was going to say not in my book. That's fine.

MR. SCHUTZ: Well, it depends.

Judge, contract claims. Fairly simple. We've got two sophisticated parties here that negotiated a contract and all we are coming to court and saying is they should be held to the benefit of their bargain and meet their contractual obligations, and at the summary judgment stage to argue that there is no disputed issue of material fact regarding these contractual provisions, I submit that that's simply not the case. So it comes down to a couple of issues.

The first issue is a couple things. TU does not dispute that the VantageScore model includes some concepts and aspects that are the same as Fair Isaac's models. They also don't dispute that these are our property. The only issue is that can the contracts be prohibited -- interpreted as prohibiting TransUnion from using this in the VantageScore model. The answer is yes. There's certainly a fact issue on this. When you start looking at the contract language which we'll do here in just a minute, you can't get to the answer no.

The second issue, they don't dispute again that they agreed to act as our agent in marketing and selling and that as our agent they have a duty of good faith and loyalty here. The only issue again is does the evidence show that TransUnion's trying to destroy our scoring business sufficient to show a material issue of fact and the answer is

yes. I mean, we spent tons of time on the antitrust part. Their goal is to put us out of business and that's totally inconsistent with being our agent and acting in that capacity. So let's just take a quick look at the --

THE COURT: Is there any evidence that they've sold less FICO scores?

MR. SCHUTZ: You know, that's really not the issue and it's a red herring, Judge, and here's why: It's absent any evidence of what they might have done had they not been trying put us out of business, make these other statements, trade off on everything that we've said. They said they've sold more in I think '07 than they did in '06 and '05, but if they hadn't done these, maybe they'd have sold an additional 50 percent more. They simply can't prevail at the summary judgment stage by making that statement. It's an incomplete argument on their part.

So if we look at the language, this again sophisticated contracting party that talks about what's our property, they agree and acknowledge -- it's fairly broadly written -- as to what our property is here and that we own it. And if we go on to -- and it includes models, okay, and we're the sole and absolute owners of the existing and future versions of the models and all proprietary rights in such items, et cetera.

Now, if we go to the next section that defines

"model," it's very broadly defined. It's not limited to -- this is just by way of example what's set forth in here. It's score weights, algorithms, characteristics, attributes, attribute breakouts, et cetera, et cetera, very broadly defined, and they agreed to that, Judge.

And we go to the next statement. It's also clear here, next part of the contract, that this is not limited to trade secrets. This is a case where the parties agreed to respect certain property even if it did not meet the definition of trade secrets. So as much as Mr. Gardner might have wanted to argue the trade secret case, that's not what we're dealing with here, Judge, and we have protection that is different from this contract than what we had under the trade secret laws.

Now, what did TransUnion agree to do after we go through the contract and we see they acknowledge that the model is our property, the model is very broadly defined? What do they agree? They agreed that they shall not copy, reproduce, or in any way duplicate the models, in whole or in part, with any other computer programs, and what is it that they in fact have done?

I don't believe, your Honor, that we put in the briefs anywhere that we said they can't use their own data. I think that's simply not correct, but we have listed here on slide 8 at least five bullet points that show what aspects of

the VantageScore scoring model represent a breach of their agreement with us.

VantageScore model, again, based on many of the same development concepts, in other words, designed to predict the likelihood of serious delinquencies of 90 days late or more within a 24-month period. They didn't have to do that. They could have, you know, picked any other period. They could have picked a delinquency of 60 days, 120 days, it could have been 18 months, could have been 30 months, all kinds of other options they had, but they did what we do.

They also use the same attributes. They use multiple inquiry de-duplication, a log-odds approach.

They also have a scoring range that low is bad and high is good.

THE COURT: Tell me what an attribute is.

MR. SCHUTZ: The attribute, Judge, if we go to -- a characteristic is -- I can give you an example. A characteristic is --

THE COURT: Maybe just giving me an example would help.

MR. SCHUTZ: Yeah, I will. That's what I'm going to do.

THE COURT: Oh. All right.

MR. SCHUTZ: A characteristic is a trade account, okay? A trade account is a credit card account. An

attribute is a number for that characteristic, two credit cards, three credit cards --

THE COURT: Is this a number that goes into the formula?

MR. SCHUTZ: Yup. That's what it is. They use a three-digit score again and they use similar adverse action codes. An adverse action code is if you're denied credit, you know, what changes that.

So it comes down to, quite frankly, a classic fact question. We're not here arguing that we win the case. We're arguing that we're entitled to go to a jury on the case. That's the procedural posture.

And again, their whole argument boils down to another provision in the contract, the confidentiality provision, and they are trying to argue that the confidentiality provision trumps the provisions that I've just talked about and that's certainly not the case, in our view, and certainly it's an issue for the jury to decide down the road.

Now, moving to just the last two points, your Honor, on the issue of TransUnion agreeing to act as our limited agent for purposes of marketing and selling, you know, here's the contractual language that we're talking about. They agreed that for those purposes they will in fact act as our agent and what have they done, how have they

breached those agency duties.

Well, they're obligated to act in good faith and with loyalty and they don't deny this, but what they've done is they've engaged in these conspiratorial acts against us in violation of the antitrust laws, violation of contractual duties.

And the whole purpose -- and this is from TransUnion's meetings notes. You can see the last bullet points on the page. What do they say? "Replace FICO anywhere they appear; B2B" -- which means business to business -- "and Consumer; everyone would see the same score." That's TransUnion meeting notes on Project Trident. So this is our agent out to sell stuff and what they're saying is they want to put us out of business. They want to replace every score with a VantageScore. The fact that they might not have done it yet doesn't change the fact that it's still their goal. I don't think they're backing away with trying to have VantageScore replace them in the marketplace.

And finally, this is just a follow-on, the interference-with-contract claim. They basically say if you get rid of the breach-of-contract claim, you got to get rid of the interference-with-contract claim. Again, that's a circular argument. We don't think the first should be dismissed and therefore the latter survives.

And I don't know -- I guess we -- I don't know if

we addressed the issue of separate trials or not. I just have one slide that we've thrown in there. The evidence is so overlapping, your Honor, it doesn't seem to make any sense to us if the case proceeds forward to have a separate trial on a breach-of-contract claim separate and apart from the main case because the facts are so intertwined.

Thank you very much.

THE COURT: All right.

Mr. Gardner, I think you will be in pain if I don't give you a minute or two to make your rebuttal argument before you get on the airplane.

MR. GARDNER: Thank you. A couple things.

We're not just relying on trade secrets. We're saying that they abandoned their trade secret claim. To the extent that there's any claim that we've misused their property, their evidence has come up with zero, so there's no evidence that we've misused their property.

Now, as far as the contracts are concerned, they can't say that we didn't do a good job selling their score. They can't say that. We did. It's the most popular score in the market. It's the biggest score that we sell. So when we look at the contract, we fulfilled all our contract obligations as their agent. We did a darn good job as their agent. Now, they have complaints about us with respect to VantageScore, but that's not in the breach-of-contract case.

I mean, that's part of what's happening here is, they're trying to meld all this together.

Now, Mr. Schutz said a couple times, well, let's let a jury decide that. Well, a jury isn't going to decide it, because as your Honor is aware, the two contracts that are really at issue in this case, the generic credit scoring cases, have jury waivers, so the trier of fact in those cases is you. So this is not -- there aren't issues of fact here that we believe are left to a jury. These are interpretations of a contract which we think your Honor -- which your Honor can decide.

And I think in conclusion what I'd like to say is, the theme that runs throughout this case is Fair Isaac has had kind of a charmed life. They've had the majority of their business life without competition. And they may have been entitled to rely on the fact that they were the first ones there and they are the language. FICO is to credit scoring as Kleenex is to tissues. And then one day what happens is competition shows up at their door. Well, naturally they're not going to like it. And their reaction to that competition is, one, this lawsuit, but two, it's what you see through every one of these claims in terms of the progression of how they start and where they are today with their antitrust claims, with the continuing theory changes, with their intellectual property claims, and now at the

bottom -- and I hope we think it's at the bottom -- is their claims against TransUnion. They failed on claim one, they failed on claim two, let's try this one and see if it works, and you ought not let them get away with it.

Thank you for your patience, your Honor.

THE COURT: All right. Well, I've heard excellent arguments by quality lawyers. I have an abundance of briefing that's been done in this case.

I want no further submissions. The only thing that I would entertain by way of a post-hearing submission is a U.S. Supreme Court case that's right on point or an Eighth Circuit case. Beyond that, I don't want to hear from you until I rule.

All right. Court is in recess.

(Proceedings concluded at 11:40 a.m.)

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C E R T I F I C A T E

I, **TIMOTHY J. WILLETTE,** Official Court Reporter for the United States District Court, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes, taken in the aforementioned matter, to the best of my skill and ability.

/s/ Timothy J. Willette

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